

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARK WAYNE CLARK,

Plaintiff,

v.

DEAN MASON, et al.,

Defendants.

CASE NO. C04-1647C

ORDER

This matter comes before the Court on the Report and Recommendation of the Honorable Mary Alice Theiler, United States Magistrate Judge (Dkt. No. 90), and Plaintiff's Objections to Report and Recommendation (Dkt. No. 91). Having reviewed the materials submitted by the parties and being fully informed, the Court hereby finds and rules as follows:

On July 19, 2004, Plaintiff, an inmate at a Washington state correctional facility, filed a complaint against twenty-five correctional officials and employees, and state Indeterminate Sentencing Review Board members (Dkt. No. 6). Plaintiff's complaint lists four broad causes of action under 42 U.S.C. § 1983, which essentially allege that Defendants violated his constitutional rights by engaging in a variety of retaliatory acts against him. On October 8, 2004, Defendants filed a motion to dismiss all or part of Plaintiff's complaint (Dkt. No. 39).

1 In her Report and Recommendation, Judge Theiler addressed each of Defendants' four arguments  
2 for dismissal and made the following findings. First, Plaintiff did not exhaust available administrative  
3 remedies with respect to the alleged unconstitutionality of a Department of Corrections' policy ("DOC  
4 450.100") because Plaintiff's claim was filed before the Department of Corrections' Defender Grievance  
5 Program completed its review of that issue. Next, Plaintiff's claims regarding events preceding July 19,  
6 2001 are barred by the applicable three-year statute of limitations because those events are considered  
7 discrete acts, as opposed to a continuing violation. In addition, claims against Defendants Garret and  
8 Austin are not viable because Plaintiff does not allege wrongdoing on their part after July 19, 2001.  
9 However, as construed, Plaintiff's claim *does* allege that his constitutional rights were violated as a result  
10 of Defendants' alleged retaliatory acts. Also, Defendants are not entitled to qualified immunity because  
11 they are accused of retaliatory acts that, if proven, violate Plaintiff's constitutional rights.

12 In his objection to Judge Theiler's Report and Recommendation, Plaintiff simply restates the  
13 charge raised in his complaint that Defendants advanced false testimony to obtain an unfair dismissal in  
14 this action and secure dismissal in a previous action. The Court finds that Plaintiff's objection fails to  
15 address Judge Theiler's findings regarding exhausting administrative remedies and the statute of  
16 limitations. Moreover, Judge Theiler noted, and the Court agrees, that while Plaintiff asserts that  
17 Defendants unfairly obtained dismissal in an earlier, nearly identical, complaint filed by Plaintiff, Plaintiff  
18 had the opportunity in that case, and on appeal, to address the false testimony issue.

19 Therefore, the Court orders as follows:

- 20 (1) The Court hereby ADOPTS the Report and Recommendation (Dkt. No. 90);
- 21 (2) Defendants' Motion to Dismiss (Dkt. No. 39) is GRANTED in part and DENIED in  
22 part;
- 23 (3) Plaintiff's claims regarding the constitutionality of DOC 450.100 are dismissed without  
24 prejudice pursuant to 42 U.S.C. § 1997(e) for failure to exhaust available administrative  
25 remedies prior to the filing of this action;

- 1 (4) Plaintiff's claims are dismissed to the extent that such claims accrued prior to July 19,  
2 2001;  
3 (5) Defendants Julia Garret and John Austin are dismissed from this action;  
4 (6) The Clerk is directed to send copies of this Order to Plaintiff, to counsel for Defendant,  
5 and to the Honorable Mary Alice Theiler.  
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7 ORDERED this 19<sup>th</sup> day of MAY, 2005.  
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10 UNITED STATES DISTRICT JUDGE  
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